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submitted via msc_clerk@courts.mi.gov

Mr. Corbin R. Davis
Michigan Supreme Court Clerk
P.O. Box 30052
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RE: ADM File No. 2003-21

Dear Mr. Davis:

I encourage the Michigan Supreme Court to adopt proposed Alternative B, although I suggest that the language be changed to "shall" dismiss.

Traveling throughout the Great State of Michigan, one soon realizes that Michigan is great in size, great in tradition, great in diversity, and has a great number of regions that are greatly different from each other.

While I do not personally know each of the 1,044 individuals who fall within the jurisdiction of the Judicial Tenure Commission, I hazard to guess that most of us embrace our responsibilities with considerable care and diligence. We take our reputation, the reputation of our profession, and constructive criticism very seriously. Most are enormously appreciative of and rely upon the regularly-updated resources made available through www.courts.mi.gov, the Michigan Judicial Institute, and the State Bar of Michigan. Fortunately, and to the great credit of many, the state of Michigan's trial courts is a stark contrast to New York's as currently chronicled in an ongoing series in *The New York Times*.

Nevertheless, when we gather at the Annual Judicial Conference or when I talk with an attorney who is based in a different community, it is always interesting to witness how uniquely different each community, each court, and each judicial officer remains.

None of us, however, are perfect and most judicial officers probably quietly admit that, on a regular basis, as we wrap our arms around the ever-unique cases, social situations, and case management protocols that present themselves.

With respect to the immediate issue before the Supreme Court, interpretive guidance is found at MCR 9.200:

> An independent and honorable judiciary being indispensable to justice in our society, subchapter 9.200 shall be construed to preserve the integrity of the judicial system, to enhance public confidence in that system, and to protect the public, the courts, and the rights of the judges who are governed by these rules in the most expeditious manner that is practicable and fair.

It has been estimated to the Supreme Court that, within the past five years, the Judicial Tenure Commission resolved at least 102 cases by admonishment even though there were not sufficient grounds to proceed to formal complaint. I struggle to see how this practice enhanced public confidence in our system and/or protected the rights of judicial officers.

Civil infractions cannot be taken "under-advisement" with the court collecting some type of fine or cost but ultimately dismissing the ticket. Misdemeanor cases cannot be disposed of through informal "under-advisement" or "local diversion" programs that result in the court collecting some type of fine, cost, or restitution but ultimately dismissing the case. The straightforward rationale has been that if the ticket or charge is dismissed, then there is no statutory authority for a court to assess and collect any fines, costs, or fees.

State law, court rules, and the Constitution require that an arrest warrant or search warrant cannot be issued if there is no probable cause. An individual charged with a felony cannot be bound over to circuit court if probable cause is not established at the preliminary examination. During the course of a criminal trial, the trial court must grant a motion for a directed verdict if the prosecution's case-in-chief would not allow a rationale trier of fact to find that the essential elements of the crime were proved beyond a reasonable doubt.

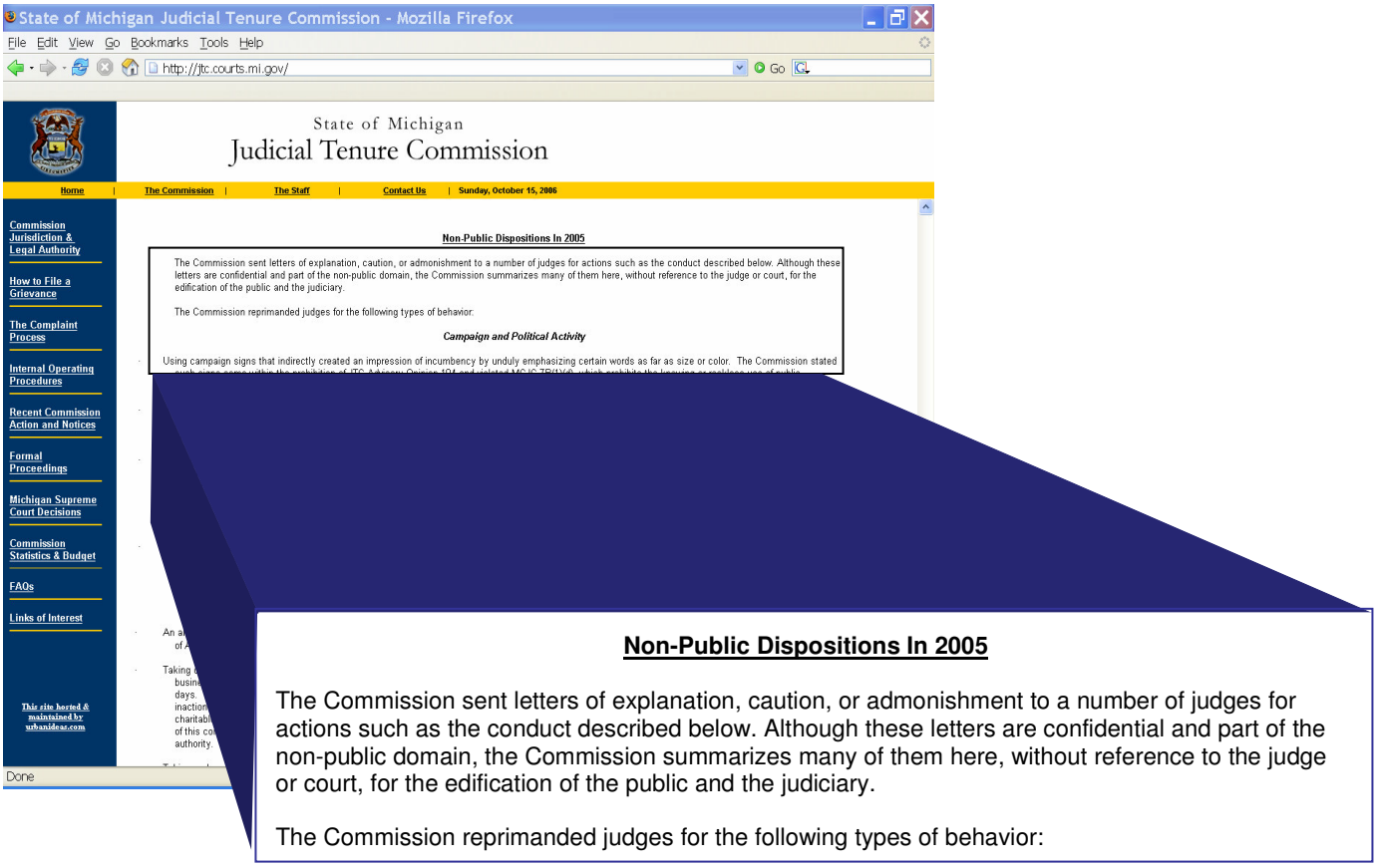
How is it that we have MCR 9.207(B)(2) and (4) which theoretically – and apparently in practice at least 102 times over the past five years – allow judicial officers to be warned or admonished even though there was not sufficient grounds to proceed with formal complaints? It is critically important to remember that MCR 9.227 is also in the background and ensures that those affiliated with the Judicial Tenure Commission enjoy absolute immunity, irrespective of the circumstances.

It is true that court rules regulating attorney misconduct allow for an attorney to be admonished; however, a closer review of the applicable court rule reveals that the admonition must be done with the attorney's consent. If an attorney contests an admonition, the attorney has a right to object and the attorney grievance commission must vacate the admonition. The attorney grievance commission must then either dismiss the request for investigation or authorize the filing of a formal complaint. See, MCR 9.106(6).

Matters alleging an "appearance of impropriety" against any respondent require particular care and caution as noted by some members of this Court in Adair v Michigan, 474 Mich 1027; 709 NW2d 567 (2006). To say that there are strong differences of opinion among the judiciary on this topic is an understatement.

What is concerning is the Judicial Tenure Commission's conclusion, at page 4 of its comments, that "admonishments, cautions, and explanations serve a useful purpose, as they can be the conduits of changed *behavior*…" (emphasis added). A literal read raises the questions, "Is the Judicial Tenure Commission the 'behavior police,' what standards are employed, is there consistency, and how far will they take it?" This invites the public to wonder, "Just what were the circumstances of those 102 admonishments and were they necessary?" It demands asking, "In matters where there is not sufficient basis to proceed to formal complaint, does the discretion given to the Judicial Tenure Commission under the current court rule impermissibly intrudes upon this Court's responsibility for disciplining an errant judicial officer and the public's separate role for evaluating judges at the ballot box?"

The Commission contends that an admonishment *is not* a form of discipline because, ultimately, the case was dismissed. However, there can be a contrary perception that a written admonishment *is* a form of discipline. In a public, online overview of some – but not all – of its 2005 "Non-Public Dispositions," the Judicial Tenure Commission currently prefaces: "The Commission ***reprimanded*** judges for the following types of behavior" (emphasis added). That web page never simultaneously mentions that those cases were ultimately *dismissed*.



Notably, this Court, in majority and minority opinions, recently referred to a "reprimand" as a form of professional *discipline* in Griev Adm'r v Fieger, ___ Mich ___; 719 NW2d 123 (2006).

Unlike that web page, the Commission never uses any form of the word "reprimand" in its comments to this Court and, instead uses the softer terms of "educating," "reminder," or "expression of warning." However, to the Internet-surfing public, the Commission portrays an "explanation, caution, or admonishment" as a "reprimand." Without any mention of "dismissal," the public is left with the distinct impression that the judicial officer was disciplined for the described actions by way of a "reprimand" from the Commission.

The existing framework does not enhance public confidence, protect the public, or protect the rights of judicial officers. If anything, such confidence is likely eroded by the confusion. In certain circumstances, the good-faith independent thinking of a judicial officer can also be jeopardized. Out of fear that some people who enjoy absolute immunity may not simply like certain "behavior" and could admonish a judicial officer even though there is insufficient basis for a formal complaint, a judicial officer may tragically disregard any notions of individuality, creativity, and innovation. With apologies to McDonald's Corporation, our judiciary cannot risk nurturing an insulated environment where judicial officers merely serve up "McJustice."

Some suggest that admonitions remain confidential. However, further discussion is warranted given the experience in Lawrence v Van Aken, 2004 US Dist LEXIS 956 (WD Mich 2004) and by the fact that the Commission publicly summarizes some – but not all – of its "non-public dispositions" on its website.

The Judicial Tenure Commission "views a dismissal with an admonishment as a dismissal." See, page 2 of its comments. Some would interpret that to mean that the matter is done and over. However, the Commission's use of the term "first-time offender" in its comments at page 3 and a reading of the Commission's Internal Operating Procedures, particularly IOP 9.207(B)-(6) and IOP 9.207(B)-(7), further suggests that such an assumption would be incorrect. Some clarification is appropriate.

In my opinion, the current rule and proposed Alternative A lack due process, are inconsistent with other practices and expectations, and do not instill public or juridical confidence. Any proposed rule by which a respondent would still have to consider filing a petition for review with the Supreme Court – despite the Commission's initial determination that there was insufficient cause to warrant the filing of a complaint – is without comparison, is unfair, and is simply not compatible with the umbrella construction of MCR 9.200.

If there is not sufficient cause to warrant the filing of a complaint, the initial request should be dismissed, as suggested by Alternative B, and the dismissal should be expeditious.

Very truly yours,

/Norene S. Redmond/

Hon. Norene S. Redmond
Chief Judge

NSR/kma